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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1348

HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Petitioner,

against

JOHN J. MOLLOY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JOHN J. MOLLOY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Warden of Green Haven State Prison, Stormville, New York, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the case of *United States of America ex rel. John J. Molloy* v. *Follette.* The judgment was entered on February 27, 1968. On March 19, 1968 the Court of Appeals denied a motion to stay its mandate.

Opinions Below

The opinion of the Court of Appeals is not yet reported. It is reproduced as Appendix "A" to this petition. The opinion of the United States District Court for the Southern District of New York is reported at 257 F. Supp. 146,

and is reproduced as Appendix "B" to this petition. The order of the Court of Appeals denying petitioner's motion to stay the mandate is not reported. It is reproduced as Appendix "C" to this petition.

Jurisdiction

The judgment of the Court of Appeals was entered on February 27, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statute Involved

New York Code of Criminal Procedure

"§ 813-c. *The motion in general*

A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

If the motion is granted, the property shall be restored unless otherwise subject to lawful detention and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Added L. 1962, c. 954, § 1, eff. April 29, 1962."

Question Presented

May a state prisoner who was convicted solely on his own plea of guilty challenge, by way of federal habeas corpus, the legality of the search which led to his arrest simply because the State of New York provides for such a procedure on appeal from the judgment of conviction (N. Y. Code Crim. Proc. § 813-c) and where absolutely no attack is made on the voluntariness of the plea of guilty?

Statement of the Case

Respondent is a New York State prisoner presently in the custody of the petitioner Warden. He was indicted on February 6, 1963 in the Supreme Court, Queens County of two counts of grand larceny in the first degree. Respondent made a pre-trial motion in the trial court to suppress evidence on the ground that it had been illegally seized. On April 4, 1963, a hearing was held on the motion. After the hearing, the motion was denied.

On April 24, 1963, respondent pleaded guilty to the crime of attempted grand larceny in the second degree to cover the indictment. He was sentenced on July 31, 1963 to a term of from one year three months to five years in prison.

Pursuant to Section 813-c of the New York Code of Criminal Procedure, respondent appealed to the Appellate Division, raising, as the statute permitted him to do, the search and seizure issue. The judgment of conviction was affirmed. *People* v. *Molloy*, 22 A. D. 2d 814, 254 N.Y.S. 2d 769 (2d Dept. 1964). The Court of Appeals also affirmed without opinion. 17 N. Y. 2d 431, 266 N.Y.S. 2d 520 (1965).

Respondent sought a federal writ of habeas corpus in the United States District Court for the Southern District of New York. The sole basis for the application was the

allegation that respondent had been the victim of an illegal search and seizure. In no respect did he attack the validity of the plea of guilty on which his conviction was based. The application was opposed by petitioner on the ground that, notwithstanding § 813-c and the fact that it allowed an evidentiary claim such as that made by respondent, the scope of federal habeas corpus jurisdiction was limited to an examination of the basis of custody, that is, the plea, and that no attack on the plea was made or maintainable.

The District Court did not reach the jurisdictional question finding instead that there was "ample probable cause" for the arrest and that the search was incident to the arrest (3a).

Between the time that the District Court decided the instant case and the time it was presented to the Court of Appeals for the Second Circuit, the Court of Appeals held that the evidentiary question was not foreclosed by the guilty plea where the State allowed the question to be reviewed on appeal. *United States ex rel. Rogers* v. *Warden,* 381 F. 2d 209 (2d Cir. 1967).

In the instant case, the Court was asked to reconsider *Rogers* since petitioner's motion for rehearing *en banc* in that case "was aborted when the panel, sustaining an alternative contention, remanded for further consideration on the merits" (9a). The Court declined to reconsider *Rogers,* finding that, while there was "some initial appeal" in the State's position that since respondent was not attacking the basis of his custody, that is the plea, he was not entitled to federal habeas corpus relief, nevertheless, "acceptance of the State's contention would make the final paragraph of § 813-c a trap rather than the beneficent and 'enlightened statute', 381 F. 2d at 214, it was meant to be" (9a).

The Court said that while the statute dealt only with appeals from denials of a motion to suppress it would be

"natural" to interpret this as reaching also to federal habeas corpus (9a). The Court declined to say what would be the result "if New York were to say in so many words that the sole remedy . . . was by an appeal or other remedies in the state system . . ." (9a-10a). The Court then found the State record "rather deficient" on the issue of probable cause and remanded the case for an evidentiary hearing (11a).

Reasons for Granting the Writ

1. The decision below makes federal habeas corpus a step in the State appellate process. It thus represents a fundamental departure from decisions and statutes defining the nature of habeas corpus and significantly alters the federal-state relationship in the area of criminal law.

A.

The Court of Appeals held that the question in the instant case "is of large consequence both to the State of New York and to the federal courts" (9a). Indeed, the case raises serious questions of the relationship between the state and federal courts with respect to the administration of criminal law and of the nature and scope of federal habeas corpus. It is respectfully submitted that, by agreeing to review the results of motions to suppress brought by New York State prisoners who have pleaded guilty simply because New York provides such review, the Court of Appeals has eliminated the distinction between the direct review and collateral attack, has made the single judge district court the next step of review beyond the seven-judge New York Court of Appeals and has obviated the need to find a basis for federal jurisdiction in anything other than state law.

This Court has long recognized that the basis for federal habeas corpus jurisdiction is distinct from the basis for

direct review by this Court of Appeals from state judgments of conviction. *Ex parte Bollman,* 8 U. S. 74. The basis for federal habeas corpus jurisdiction is custody. This basis is fixed by statute (see, *e.g.,* 28 U.S.C. § 2241[c][3]; § 2254[a]) and is rooted in traditional concepts of the nature and function of habeas corpus. See: *Fay* v. *Noia,* 372 U. S. 391, 423, 430-32; *Jones* v. *Cunningham,* 371 U. S. 236; *Parker* v. *Ellis,* 362 U. S. 574. The basis of custody in turn is the judgment of conviction and the conviction here is based solely on the plea of guilty. *Kercheval* v. *United States,* 247 U. S. 220, 223.

Since the basis of custody is the plea of guilty, any challenge by way of habeas corpus must be to that plea. No such challenge was made in the instant case. Instead, respondent merely alleged that he was the victim of an unlawful search and seizure and that, since New York agreed, on appeal from the judgment of conviction, to review the result of his motion to suppress, the federal courts should do the same. The effect of adopting this argument is to make the federal habeas corpus court simply the next step in the state appellate process, an effect which this Court has thus far refused to sanction. See *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 274.

Even though the scope of habeas corpus has been greatly expanded in recent years (see *Fay* v. *Noia, supra*), the historical distinction between direct and collateral review has still been maintained. For example, since the decision in *Noia,* this Court has twice held that new enunciations of constitutional rights would apply only to future cases and those in the direct appellate process, but not to collateral proceedings. *Linkletter* v. *Walker,* 381 U. S. 618; *Tehan* v. *Shott,* 382 U. S. 406. *Cf. Johnson* v. *New Jersey,* 384 U. S. 719. The state courts have the primary responsibility for enforcement of the criminal law and the independent duty to follow federal law and to enforce constitutional rights. *Dowd Box Co.* v. *Courtney,* 368 U. S. 502,

506-598, 514; *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 229-31, 234-35; *Frank* v. *Magnum*, 237 U. S. 309, 329.

The fact that New York allows defendants who, like respondent, have pleaded guilty to obtain review of a pretrial motion on an appeal from judgment does not alter the cause of the conviction or of custody. A State legislative expansion of a statutory right beyond that which the United States Constitution mandates cannot confer on that State's prisoners special federal rights or effect the scope of jurisdiction of federal habeas corpus. See, *e.g.*, *Cooper* v. *California*, 386 U. S. 58; *Chapman* v. *California*, 386 U. S. 18; *United States ex rel. Laino* v. *Warden*, 246 F. Supp. 72, 77 (S.D.N.Y. 1965), *aff'd* 355 F. 2d 208 (2d Cir. 1966). The Court below nevertheless found that because New York permitted appellate review in the instant case, it must do so too. However, such a result ignores the fact that federal jurisdiction rests in federal law only. For example, between the decision of this Court in *Wolf* v. *Colorado*, 338 U. S. 25 and *Mapp* v. *Ohio*, 367 U. S. 643, the State of California adopted the exclusionary rule even though it did not at that time apply to the states. *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905 (1955). Nevertheless, it was not until this Court decided the *Mapp* case that it undertook to review California judgments of conviction applying the exclusionary rule. *Ker* v. *California*, 374 U. S. 23. *Contrast United States ex rel. Carafas* v. *LaVallee*, 334 F. 2d 331 (2d Cir.), *cert. den.* 381 U. S. 951. Thus, the Court below in resting its jurisdiction on state law completely ignores the decisions of this Court to the contrary.

The misunderstanding of the Court below as to the basis for its jurisdiction is highlighted by the fact that it suggests that New York might adopt legislation limiting the scope of federal review (10a). The idea that New York could legislate federal jurisdiction is completely erroneous and New York did not attempt to do so by its passage of

§ 813-c. The suggestion of the Court below that the statute, in saying that it will not foreclose appeal from the denial of a motion to suppress, is capable of being read to include federal habeas corpus not only ignores the fact that New York cannot legislate for the federal courts, but ignores the fact that the statute specifically refers to "appeal from the judgment of conviction". Any misunderstanding as to the meaning of the statute can arise only if all distinction between appeal from the judgment of conviction and federal habeas corpus is obliterated.

B.

Both the opinion below and the opinion in *United States ex rel. Rodgers* v. *Warden, supra,* do appear to rest at least part of their analysis on the nature of the plea they believe to have been entered in the instant case. The *Rogers* opinion attempts to do this by considering the question to be whether the guilty plea is a waiver of the right to challenge the search and seizure, not whether the guilty plea itself suffers from any constitutional infirmity. *United States ex rel. Rogers* v. *Warden, supra,* at 212-213. It seems clear, however, that to maintain that the question is solely one of waiver is to embark on a manifestly inconsistent and necessarily incomplete analysis of the problem. In finding the question to be one of waiver, the *Rogers* opinion maintains that the voluntary nature of the plea is irrelevant (*id.* at 215 n. 7, 8). But at the same time the opinion bases its finding of no waiver on the defendant's loss of "heart", on his being "lulled", on his "hard choice" (*id.* at 214-15), all very much factors looking to the nature of the plea itself, although clearly not, without more, sufficient to render the plea involuntary. Moreover, somehow the nature of the plea has changed if the question is to be a waiver. From a judgment of conviction it has become "merely a procedural step" (*id.* at 214, 215 n. 7). Presumably if habeas corpus is denied by the federal system the "procedural step" becomes once more a judgment

of conviction. In short, the logic of habeas corpus jurisdiction is inexorable—the only relevant consideration is the validity of the basis of conviction, in this case the plea. Attempts to substitute any other consideration lead only to such inconsistencies as described.

The opinion below suggests an analysis similar to the *Rogers* analysis by holding that refusal to review motions to suppress "would make the final paragraph of § 813-c a trap . . . ." (9a). The opinion overlooks not only the fact that the statute specifically provides that it applies only to appeals from the judgment of conviction but also overlooks the fact that no allegation was made in the instant case that the availability of federal habeas corpus in any way motivated the plea of guilty and overlooks the further fact that, had the court simply held that it would not review such judgment of conviction, any claim that future pleas would be based on the availability of habeas corpus would be foreclosed.

Moreover, the Court below assumed that most defendants who make pre-trial motions to suppress evidence which are denied and who then plead guilty have raised substantial questions of illegal search and seizure. It further assumed that they could not be convicted without the introduction of that evidence and that no issues remained to be tried after a decision on the motion to suppress. In fact, however, motions to suppress evidence are often made as a matter of course and frequently raise claims which are totally frivolous. Motions to suppress evidence are made whether or not the evidence is essential to the prosecution. In fact, under § 813-c, no allegation that the evidence was necessary to convict is required either before the motion is made or as a condition for appeal; and appeal is allowed even where the evidence does not relate to the count of the indictment to which the defendant pleaded guilty. *People* v. *Lakin*, 21 A. D. 2d 902 (2d Dept., 1964).

2. The decision below places New York pleas of guilty on a different basis from pleas of other States and the federal courts.

The *Rogers* opinion rests its abstract determination that there is no waiver by virtue of the plea of guilty on a statement that New York, by enlarging the right to appeal, confronts the defendant with a "hard choice". The opinion seems to be contrasting his position with that of defendants in other jurisdictions. It implies that most non-New York defendants whose pre-trial motions to suppress have been denied proceed to trial, because they are not presented with the attractive alternative supplied by the New York statute. Such is not the case. A great many non-New York defendants plead guilty after pre-trial motions to suppress have been denied. See *e.g. United States* v. *Doyle,* 348 F. 2d 715 (2d Cir. 1965), *cert. denied* 382 U. S. 843; *Winston* v. *United States,* 224 F. 2d 337 (2d Cir. 1955), *cert. denied* 350 U. S. 916. Some of those defendants had substantial Fourth Amendment claims and were presented with very "hard choices". Each nevertheless was bound by his tactical decision to take the immediate and certain leniency afforded by the plea of guilty, instead of relying on the possibility of being acquitted or of having the evidence suppressed on appeal.

Under § 813-c no special plea of any kind is created, nor is the defendant required to enter a *nolo contendere* plea. The plea is in no way conditioned upon the receipt of evidence. The defendant does not have to reserve his right to appeal at the time of making the motion, after denial thereof, or at the time of pleading or sentence. In fact, appeal under § 813-c has been allowed where a plea of guilty was entered before the enactment of the statute. *People* v. *Sullivan,* 18 A. D. 2d 1066 (1st Dept. 1963). Also see *People* v. *Rosen,* 24 A. D. 2d 1009 (2d Dept. 1965).

It could happen that an individual defendant might be misled into pleading guilty by a patent misunderstanding of his rights. An attack in such a case should properly

be made against the plea and should first be made in the state courts. The courts of New York have indicated that they will allow the withdrawal of a plea entered under a mistaken interpretation of the appeals provision of § 813-c. *People* v. *Habel,* 25 A. D. 2d 182 (1st Dept. 1966), *aff'd* 18 N. Y. 2d 148, *app. dism.* 388 U. S. 451 (1967). However, no facts in the instant case indicate the plea was entered with any mistaken understanding of the scope of review or was the result of any improper inducement by the State. The basis of appellant's custody is still his guilty plea. The fact that the State has broadened its scope of review has in no way altered the nature or effect of his plea.

Only in New York State and only in cases where the procedures in New York Code of Criminal Procedure § 813-c are available will federal habeas corpus be held to lie to review evidentiary questions with respect to evidence never introduced at trial and which does not form the basis of conviction. The impact of this decision is to set apart all New York pleas of guilty and to create for the Second Circuit and for the District Courts of New York a problem of enormous practical importance to the administration of justice.

The ratio of New York convictions based on pleas of guilty to those based on trial verdicts is 22 to 1.* This is

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* Source of statistics is the "Twelfth Annual Report of the Judicial Conference of the State of New York", Legislative Document (1967) No. 90 at 450, Table 30 "The Supreme and County Courts Disposition of Felonies and Misdemeanors *January 1, Nineteen Hundred and Sixty-Five through December 31, Nineteen Hundred and Sixty Five*". The figures for 1965 are quite typical. For example, the 1963 report which includes statistics for 1961, the year before the passage of § 813-c, shows that there were 15,668 convictions, 15,010 of these by reason of plea of guilty and 658 by reason of trial verdict. "Eighth Annual Report of the Judicial Conference of the State of New York", Legisltaive Document (1963) No. 91 at page 224, Table 32. The state-wide totals referred to do not include the thousands of convictions for misdemeanors in the criminal courts of the City of New York, since they are undifferentiated from lesser offenses in a separate table (see id. at p. 453, Table 33, col. 2).

an approximate reflection of the increase in the number of habeas corpus cases involving search and seizure claims which the federal courts in this Circuit can expect to face as a direct result of this decision. In absolute numbers the result is even more staggering. In 1965 there were a total of 16,992 convictions, of which 16,248 were by plea of guilty and of which only 744 by trial verdict. It would be conservative to assume that ½ of these cases present the possibility of the introduction of tangible evidence. A substantial and increasing number of the defendants in such cases will make pre-trial motions to suppress such evidence, especially in light of New York's permissive statute. Even assuming that only ¼ of the defendants whose cases could involve the introduction of tangible evidence make such motions and that the federal courts in a given year will only review one year's convictions, this would mean that the potential case load for the Second Circuit on search and seizure claims by New York prisoners would be radically increased.

These concededly rough estimates illustrate the enormity of the burden on the administration of justice which would result. Statistical predictions would be not an answer to a finding that petitioners had been treated unfairly. However, that is not the basis for the decision which, on the contrary, approves New York's "enlightened" statutory scheme (9a). The decision constitutes an important enlargement of the jurisdiction of the federal courts which ought to be reviewed by this Court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Dated: New York, N. Y., April 17, 1968.

Respectfully submitted,

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Appendix A.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

66 Civil 154

OPINION

UNITED STATES OF AMERICA ex rel. JOHN J. MOLLOY,

Petitioner,

against

HON. HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Respondent.

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EDWARD WEINFELD, D. J.

Petitioner, serving a sentence at Green Haven Prison, New York, of one year and three months to five years, imposed pursuant to a judgment of conviction entered upon his plea of guilty to attempted grand larceny in the second degree, seeks his release upon a federal writ of habeas corpus. He contends that his federally protected right against unlawful search and seizure under the Fourth Amendment was violated.

Petitioner in the State Courts raised the claims here presented in a pretrial motion to suppress the alleged illegally obtained evidence derived as a result of a search of his person, to-wit, an automobile registration certificate. His motion was denied. Thereupon, petitioner pleaded guilty, but following his sentence he appealed and his constitutional claims were reviewed by the State Appellate Courts,[1] found wanting, and the judgment of conviction affirmed.[2] It is conceded, except as to one claim hereafter discussed, that petitioner has exhausted available state remedies.

The state hearing on the motion to suppress and subsequent events developed the following: Detective Gagliardi,

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[1] N. Y. Code Crim. Proc. § 813-c allows a defendant claiming an unlawful search and seizure to apply for pretrial suppression and, if denied, to obtain review upon appeal from the judgment of conviction notwithstanding the fact that the conviction was predicated upon a guilty plea. The state here contends despite this statute that the plea of guilty, since it is the equivalent of a conviction at trial, precludes consideration by this Court of the alleged federal constitutional claim of unlawful search and seizure. The Court does not reach this issue or express any view thereon since it has disposed of petitioner's claim upon the merits. Moreover, the Court has been advised that there are presently pending in the Court of Appeals several matters which present this issue. See *United States ex rel. Jackson* v. *Follette*, Doc. No. 30679, 2d Cir.; *United States ex rel. LaMonica* v. *Buono*, Doc. No. 30640; *United States ex rel. Rogers* v. *LaVallee*, Doc. No. MR 930, 2d Cir.

[2] *People* v. *Molloy*, 22 App. Div. 2d 814, 254 N.Y.S. 2d 769 (2d Dep't 1964), aff'd 17 N. Y. 2d 431 (1965).

who was on radio patrol duty on the night of November 21, 1962, received a call that there were prowlers in the vicinity of 871 Flatbush Avenue, Brooklyn. He proceeded to the roof of the premises to investigate a possible burglary and saw the defendant on another roof at 12 Martense Street, 100 feet from 871 Flatbush Avenue. The detective questioned the petitioner, who told him that he had been in a fight in the street and had gone to the roof to find a place to sleep. Detective Gagliardi took petitioner to the street, where he again questioned him, received the same answer and thereupon, in the absence of a satisfactory explanation of what petitioner was doing in the neighborhood, placed him under arrest. The detective then seached petitioner and found a motor vehicle registration certificate on him, but in the name of another person. Parked in front of 12 Martense Street was a car bearing a registration plate number corresponding to that shown on the certificate found on petitioner's person. The detective also found one John Herbert Smith secreted in the car under the front dashboard and placed him under arrest. Both were charged upon a complaint with burglary in the first degree and possession of burglar's tools, but these charges were dismissed. Subsequently they were indicted for the theft of the automobile. An investigation had disclosed that the car had been stolen and that the license plate thereon, which correspond to that shown on the registration card on petitioner's person, was not properly on the car.

Petitioner here contends that his federally protected rights were violated in that (1) he was illegally arrested without probable cause, and (2) the seizure of the registration certificate was not a "lawful incident" of an arrest by a police officer investigating a suspected burglary.

There was ample probable cause for petitioner's arrest. Under New York's Code of Criminal Procedure, a police officer may arrest without a warrant, not only when a felony has in fact been committed but also "when he has

reasonable cause for believing that a felony has been committed, and that the person arrested has committed it, though it should afterward appear that no felony has been committed. . . .'"[3] Considering that the detective had been directed to the scene of a suspected crime by official authority, the petitioner's presence at an unusual place in the area of a suspected burglary at that time a year and day and the lack of satisfactory explanation for his presence in the general area, the officer had probable cause to believe that a felony had been committed by the petitioner and hence the arrest was lawful.[4] The fact that petitioner was discharged upon the burglary charge for which he was originally arrested or that no burglary actually had been committed does not negate the existence of probable cause for the arrest.[5] The test of probable cause for an arrest does not require evidence necessary to support a conviction upon a trial.[6] The standard to be applied in each instance is substantially different.

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[3] N. Y. Code Crim. Proc. § 177(4).

[4] See *United States* v. *Zimple*, 318 F. 2d 676, 677 (7th Cir.), cert. denied, 375 U. S. 868 (1963) (defendant present in unusual place gave unsatisfactory explanation for his presence there); *United States* v. *Heitner*, 149 F. 2d 105, 106-07 (2d Cir.), cert. denied *sub nom. Cryne* v. *United States*, 326 U. S. 727 (1945) (police received orders from precinct to proceed to certain building for investigation); *People* v. *Cassone*, 20 App. Div. 2d 118, 245 N.Y.S. 2d 843 844 (1st Dep't 1963), aff'd 14 N. Y. 2d 798, cert. denied, 379 U. S. 892 (1964) (unusual time of day and year).

[5] See *United States ex rel. Robinson* v. *Fay*, 239 F. Supp. 132, 137 (S.D.N.Y. 1965), cert. denied, 382 U. S. 998 (1966); *People* v. *Roach*, 44 Misc. 2d 40. 253 N.Y.S. 2d 24, 28 (Sup. Ct. 1964). Cf. *United States ex rel. Boucher* v. *Reincke*, 341 F. 2d 977, 980 (2d Cir. 1965).

[6] See *Draper* v. *United States*, 358 U. S. 307, 311-12 (1959); *Stephens* v. *United States*, 271 F. 2d 832, 834 (D. C. Cir. 1959). "In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, 338 U. S. 160, 175 (1949).

The petitioner contends, however, that even though there was probable cause for his arrest and a search of his person was permissible as an incident thereof, nonetheless the registration card was not seizable in the course of the authorized search.

Since the search was valid, that it turned up matter unrelated to the burglary charge for which petitioner was initially arrested does not foreclose its use.[7] The objects which may be validly seized as an incident to a lawful arrest extend to stolen and forged papers,[8] documents used as a means to commit a crime or which can be used to establish a false identity,[9] or property the possession of which is a crime.[10] The registration card was capable of ready use to establish a false identity as the owner of the car on which was displayed the false registration plate. Since the initial arrest was lawful, the seizure of this material found upon the defendant was proper.

Petitioner finally contends that a federally protected right was violated when the arresting officer failed to comply with section 180 of New York's Code of Criminal Procedure, which requires that an officer, making an arrest without a warrant, inform the defendant of the reason for his arrest.[11] The state in reply urges that the issue was not previously tendered to the state courts and hence peti-

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[7] *Abel* v. *United States*, 362 U. S. 217, 238 (1960); *Harris* v. *United States*, 331 U. S. 145, 155 (1947); *United States ex rel. Boucher* v. *Reincke*, 341 F. 2d 977, 980 (2d Cir. 1965).

[8] *Gouled* v. *United States*, 255 U. S. 298, 309 (1921).

[9] *Abel* v. *United States*, 362 U. S. 217, 238 (1960).

[10] *Harris* v. *United States*, 331 U. S. 145, 155 (1947).

[11] The statute provides: "When arresting a person without a warrant the officer must inform him of the authority of the officer and the cause of the arrest, except when the person arrested is in the actual commission of a crime, or is pursued immediately after an escape."

tioner has failed to exhaust available state remedies. It is in error, since the precise claim was made in the New York State Court of Appeals.[12] Thus, the matter is properly before this Court. However, the issue is resolved against petitioner, since the alleged violation of the state statute does not raise a federal constitutional question.[13]

The petition is dismissed.

Dated: New York, N. Y., August 18, 1966.

EDWARD (Illegible),
United States District Judge.

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[12] The headnote to the court's decision states: "In the Court of Appeals defendant argued . . . that Gagliardi's failure to inform him of the reason for his arrest also rendered the arrest and the subsequent search of his person unlawful." *People* v. *Molloy*, 17 N. Y. 2d 431, 433 (1965).

[13] *United States ex rel. Coffey* v. *Fay*, 242 F. Supp. 382, 385 (S.D.N.Y. 1965), aff'd 356 F. 2d 460 (2d Cir. 1966).

Appendix B.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 232—September Term, 1967.

(Argued December 6, 1967 Decided February 27, 1968.)

Docket No. 31840

UNITED STATES OF AMERICA *ex rel.* JOHN J. MOLLOY,

Relator-Appellant,

—v.—

HAROLD W. FOLLETTE, Warden of Green Haven Prison, Stormville, New York,

Respondent-Appellee.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and FRIENDLY, *Circuit Judges.*

Appeal from an order of the District Court for the Southern District of New York, Edward Weinfeld, *Judge,* denying, without a hearing, an application by a state prisoner for habeas corpus on the ground of an illegal search and seizure. Order vacated and an evidentiary hearing directed.

C. DICKERMAN WILLIAMS, New York, N. Y., *for Relator-Appellant.*

BRENDA SOLOFF, Assistant Attorney General (Louis J. Lefkowitz, Attorney General, State of New York; Samuel A. Hirshowitz, First Assistant Attorney General on brief), *for Respondent-Appellee.*

FRIENDLY, *Circuit Judge:*

John J. Molloy was charged by the State of New York with attempted grand larceny of an automobile. He moved for the suppression of the automobile registration card found upon his person as a result of an allegedly illegal search. The Supreme Court, Queens County, denied the motion. Molloy then pleaded guilty and was convicted and sentenced. Despite this, as permitted by the final paragraph of § 813-c of the New York Code of Criminal Procedure, he pressed the issue of illegal search by an appeal. The Appellate Division affirmed in a memorandum, 22 App. Div. 2d 814, 254 N.Y.S. 2d 769 (2d Dept. 1964), and was affirmed by the Court of Appeals, 17 N. Y. 2d 431, 266 N.Y.S. 2d 520 (1965).

Molloy then sought a writ of habeas corpus in the District Court for the Southern District of New York. Taking note of the State's contention that such relief was precluded by Molloy's guilty plea, an issue then before this court and subsequently decided against the State, *United States ex rel. Rogers* v. *Warden,* 381 F. 2d 209 (2 Cir. 1967), the district judge ruled against Molloy on the merits, on the basis of the record in the State suppression hearing. This appeal followed.

Before discussing Molloy's complaint we must deal with the Attorney General's earnest contention that we should affirm on the ground that *Rogers* was wrongly decided or, more accurately, that we should seek the convocation of

the court *in banc* to pass upon that issue.[1] If we disagreed with *Rogers*, we would follow the latter course since the question is of large consequence both to the State of New York and to the federal courts. But we do not.

There is some initial appeal in the State's argument that habeas corpus tests the legality of custody, that the State's custody of Molloy is pursuant to his conviction on his plea of guilty, that there is no claim that the plea was improperly induced, and that New York's decision to allow a criminal defendant to appeal from a judgment of conviction on the ground of error in a suppression ruling notwithstanding a guilty plea goes beyond the requirements of the Constitution and should not enlarge a prisoner's right to federal habeas corpus.[2] But acceptance of the State's contention would make the final paragraph of § 813-c a trap rather than the beneficent and "enlightened statute," 381 F. 2d at 214, it was meant to be. While in strict letter New York has said only that a plea of guilty will not foreclose *appeal* from the denial of a motion to suppress, defendants and their counsel would scarcely read the statute so narrowly; the natural interpretation would be rather that they might plead guilty and still preserve all remedies with respect to the alleged unlawful search that would otherwise have been available—including ultimate resort to a federal court. What the result should be if New York were to say in so many words that the sole

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[1] The State points out that it sought rehearing *in banc* in *Rogers* but that consideration of its request was aborted when the panel, sustaining an alternative contention, remanded for further consideration on the merits.

[2] We do not indicate any view on how far a plea of guilty forecloses an attack on the basis that it was motivated or in effect compelled by prior violations of a defendant's constitutional rights, an issue that is expected to be further considered by this court in *United States ex rel. Richardson* v. *McMann*, Docket No. 31402, Calendar No. 371.

remedy with respect to an illegal search preserved on a plea of guilty was by an appeal or other remedies in the state system, we are not now required to decide.

The record of the state suppression hearing consists solely of the testimony of Detective Gagliardi. Being assigned to radio motor patrol in Brooklyn on the night shift of November 21, 1962, he received a call to proceed to 871 Flatbush Ave. "where there were prowlers." He saw—from somewhere—Molloy on the roof of 12 Martense St., 100' north of 871 Flatbush Ave. Somehow Gagliardi got to the roof of 12 Martense St. and asked Molloy what he was doing there. Molloy responded that he had had a fight on the street, and, to get away from his assailants, had gone to the roof "to find a place to sleep." Finding this explanation not wholly convincing, Gagliardi "took him . . . down into the street" and questioned him again. When this produced the same answers, Gagliardi placed Molloy under arrest, searched him and seized a registration for a 1957 Oldsmobile with plates numbered AD 5717. He then "searched the area and found one John Herbert Smith secreted under the front dashboard of an automobile parked in front of 12 Martense Street," with license plates of the same number.[3]

If Detective Gagliardi had reasonable cause to believe that a felony had been committed at 12 Martense St., 871 Flatbush Ave., or elsewhere in the neighborhood, at least if there was possible access between the locus of the crime and the place where Molloy was found, Molloy's presence on a roof top and his absurd explanation gave sufficient reason for believing he had committed the crime to justify his arrest. Being on a roof in what we take to have been an early November morning is quite different from what

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[3] It was later found that the plates did not belong to the car.

were considered the benign circumstances in *Henry* v. *United States,* 361 U. S. 98 (1959). But the initial "if" is where the state record is rather deficient. In contrast to *United States ex rel. McCullers* v. *McMann,* 370 F. 2d 757 (2 Cir. 1967), where the trial transcript showed a report of burglary of a particular store at a specified time, both near the place where and time when McCullers was found, here the record discloses only that Gagliardi had been told of "prowlers in the vicinity" and the vague statement "I was investigating a burglary." The State should have an opportunity to cure this deficiency, e.g., by furnishing further evidence of what burglary had been reported and where and when, and the physical relation of the locus to 12 Martense St.[4]

We therefore vacate the order and direct a hearing consistent with this opinion. The court's thanks go to C. Dickerman Williams, Esq., for his concise and effective presentation as assigned counsel on Molloy's behalf.

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[4] The State does not seek to uphold the search as a "frisk."

Appendix C.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of March, one thousand nine hundred and sixty-eight.

UNITED STATES, ex rel., JOHN J. MOLLOY,

Relator-Appellant,

v.

HAROLD W. FOLLETTE, Warden, Green Haven Prison, Stormville, New York,

Respondent-Appellee.

It is hereby ordered that the motion made herein by counsel for the appellee, by notice of motion dated March 7, 1968 to stay the issuance of the mandate pending a petition for a writ of certiorari to the Supreme Court of the United States, be and it hereby is denied in light of the representation of counsel that he will not press the evidentiary hearing pending action on the petition, which the State is requested to file within 30 days.

J. EDWARD LUMBARD,
HENRY J. FRIENDLY,
Circuit Judges.

19 March 1968